

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
KENNETH L. MIMS and)
LEONARD R. CANNON A/K/A/)
ROBBY CANNON,)
)
Defendants.)
_____)

Civil Action No.: 2:07-cv-3624

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Army Corps of Engineers ("COE"), has filed the Complaint herein against Defendants, Kenneth L. Mims ("Mims") and Leonard R. Cannon a/k/a Robby Cannon ("Cannon"), (collectively, "Defendants" or "Settling Parties"), alleging that the Defendants have violated section 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(b) and (d) and Section 10 of the Rivers and Harbors Appropriation Act of 1899 ("RHA") , 33 U.S.C. § 403.

WHEREAS, the Complaint alleges that Defendants discharged of pollutants and sediment material into the navigable waters of the United States, at or near the privately owned dock of Defendant Mims in Morgan Creek, which is located at or near 34 Waterway Island Drive, Isle of Palms, Charleston County, South Carolina

29451-2728. It is alleged that this discharge of pollutants and sediment material occurred without

authorization by the United States Department of the Army, in violation of CWA section 301(a), 33 U.S.C. § 1311(a) and RHA Section 10, 33 U.S.C. § 403.

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants and sediment material into navigable waters of the United States in violation of the CWA and RHA; (2) to require Defendants, at their own expense and at the direction of COE, to restore the damages caused by their unlawful activities; and (3) to require Defendants to pay a civil money penalty as provided in 33 U.S.C. § 1319(d);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA and RHA, as set forth in the Complaint between the Settling Parties and the United States;

WHEREAS, the United States and the Settling Parties agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims against the Settling Parties in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against the Settling Parties in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA, RHA, and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without

further adjudication of any issue of fact or law or any finding that the Settling Parties placed pollutants and sediment material into navigable waters of the United States, and

upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to CWA § 309(b), 33 U.S.C. § 1319(b), RHA § 403 and §406 and 28 U.S.C. §§ 1331, 1345, and 1355.

2. Venue is proper in the District of South Carolina pursuant to CWA § 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and (c), because one or more of the Defendants is located and/or conducts business in this District; the subject property is located in this District; and the cause of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309, and 404 of the CWA, 33 U.S.C. § 1311, 1319, and 1344 and RHA § 403.

II. APPLICABILITY

4. The provisions of this Consent Decree shall apply to and be binding upon the parties to this action, as well as their officers, agents, servants, employees and successors.

III. SCOPE OF CONSENT DECREE

5. This Consent Decree shall constitute a complete and final settlement between and among the Settling Parties and the United States of all claims that are the subject of the Complaint.

6. This Consent Decree in no way affects or relieves the Settling Parties of their responsibility to comply with any applicable federal, state, or local law, regulation or permit.

7. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

8. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

9. Nothing in this Consent Decree shall constitute an admission of fact or law by any party. This Consent Decree is entered into by the parties to avoid further litigation of disputed claims.

IV. SPECIFIC PROVISIONS

A. CIVIL PENALTIES

10. Defendants, jointly or severally, shall pay a civil money penalty to the United States in the amount of Fifteen Thousand Dollars (\$ 15,000.00) within thirty (30) days of entry of this Consent Decree. 33 U.S.C. § 1319(d).

11. Defendants shall make the above-referenced payments to the U.S. Department of Justice account referencing the civil action number. Payment shall be

Department of Justice account referencing the civil action number. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's office for the District of South Carolina.

Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will

be credited on the next business day.

12. Civil penalty payments pursuant to this Consent Decree are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

B. RESTORATION

13. The Settling Parties, individually or jointly, agree to restore the navigable capacity of Morgan Creek, at or near the bulkhead areas at 32, 33 and 34 Waterway Island Drive, Isle of Palms, Charleston County, South Carolina 29451-2728, which is further described in Attachment A. Defendants, at their own expense, will propose a Restoration Plan, for the approval of the Corps of Engineers, to include (1) the removal of sediment material, which will allow the adjacent docks at 32, 33, and 34 Waterway Island Drive, Isle of Palms, Charleston County, South Carolina depths within at least one foot below the front of the docks at mean low water (MLW) tide, utilizing for comparison a survey drawing produced by Southeastern Surveying of Charleston, Inc. on January 4, 2007 entitled "A

Hydrographic Survey of a Portion of Morgan Creek Located on the Isle of Palms, Charleston County, South Carolina” and (2) placement and stabilization of the removed sediment material. This Restoration Plan must be submitted to the COE within sixty (60) Days after the entry of this Consent Decree. Removal of the sediment material would be acceptable, for example, by a barge mounted track hoe with a bucket and/or clamshell rig. The removed sediment material should be properly removed and stabilized; transported off site to a permitted landfill; and appropriate erosion control measures undertaken relative to the storage or disposal of the dredge material. Laboratory testing of the sediment will not be required prior to disposal. Restoration is to be implemented in accordance with best management practices both during and after the sediment removal in accordance with local and state regulations. Restoration will be completed within 180 days after approval of the Restoration Plan by the Corps of Engineers. Documentation of the final restored elevations will be accomplished by a surveying company acceptable to and approved by the Corps of Engineers. Sediment will be removed first under docks if reasonable and practicable without hydraulic dredging. If removal of sediment under the docks is not reasonable and practical without hydraulic dredging, then the sediment will be removed to a depth of one foot below mean low water (MLW) under the docks to the rear of the docks if the landowner temporarily moves the docks. If the owner does not move the docks, the Defendant will excavate the front and side of the docks as referred to

above.

14. As a condition of this Consent Decree, the Settling Parties shall be entitled to rely upon the provisions of NWP-32 issued by the COE pursuant to 33 C.F.R. Section 330 to allow sediment activities to remain in place in compliance with the terms of this Consent Agreement. No onsite or offsite mitigation will be required for the adverse impacts to the waters of the United States. The United States, through the Army Corps of Engineers, upon completion of requirements set forth in Restoration Plan, shall forward a letter to the Settling Parties stating that the requirements in the Restoration Plan have been met.

C. INJUNCTION

15. Upon entry of this Consent Decree, the Settling Parties, are hereby permanently and forever enjoined from the unauthorized use of propeller-wash agitation dredging to deepen any portion of Morgan Creek. This prohibition is not intended to preclude the ordinary and necessary vessel navigation in Morgan Creek.

V. NOTICES

16. Within thirty (30) days of the deadline for completing any task set forth the Restoration, the Settling Parties shall provide the United States with written notice, at the address specified in Section VI. of the Consent Decree, of whether or not that task has been completed.

17. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

VI. ADDRESSES

18. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses;

A. TO THE UNITED STATES DEPARTMENT OF JUSTICE:

R. Emery Clark
Assistant United States Attorney
U.S. Department of Justice
1441 Main Street, Suite 500
Columbia, SC 29201

B. TO DEFENDANTS:

Gedney M. Howe, III
8 Chalmers Street
Charleston, S.C. 29402
(Defendant Mims)

Frank M. Cisa
858 Lowcountry Blvd. Suite 101
Mt. Pleasant, SC 29464
(Defendant Cannon)

VII. COSTS

19. Each party to this Consent Decree shall bear its own costs and attorney's

fees in this action.

VIII. PUBLIC COMMENT

20. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose material facts, which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Settling Parties consent to the entry of this Consent Decree without further consent.

IX. CONTINUING JURISDICTION OF THE COURT

21. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

X. MODIFICATION

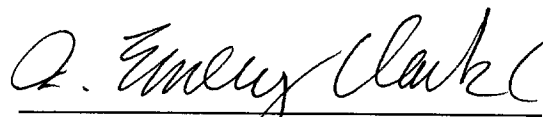
22. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Settling Parties and approved by the Court. This Consent Decree shall terminate upon the later of

five

(5) years or the fulfillment of all obligations under Section IV of this Consent Decree.

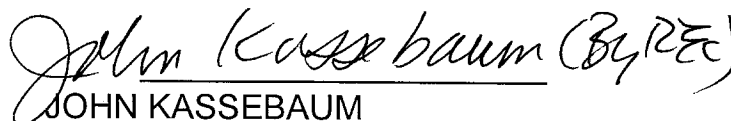
AGREED AND ACCEPTED.

Date: Oct 29, 2007, 2007



R. EMERY CLARK (#1183)
Assistant United States Attorney
District of South Carolina


Date: Oct 29, 2007



JOHN KASSEBAUM
Assistant District Counsel
Army Corps of Engineers


Signature page: United States v. Mims and Cannon)

Date: Oct. 1, 2007



GEDNEY M. HOWE, III (#1971)
Attorney for Kenneth L. Mims

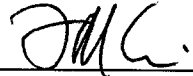
Date: October 01, 2007



Kenneth L. Mims

(Signature page: United States v. Mims and Cannon)

Date: September 19, 2007



FRANK M. CISA (#)
Attorney for Leonard R. Cannon
A/K/A Robby Cannon

Date: September 19, 2007



Leonard R. Cannon

IT IS SO ORDERED.

Dated and entered this ____ day of _____, 2007.

United States District Judge